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No. 90-411

FILED
NOV 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

TRINITY INDUSTRIES, INC., ET AL., PETITIONERS

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

May the Secretary of Labor, after receiving an employee complaint of a particular safety and health violation, subpoena the employer's occupational injury and illness and related employment records in order to determine whether to seek a warrant to conduct a comprehensive plant-wide inspection?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 904 F.2d 867. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1990. The petition for a writ of certiorari was filed on September 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, "to assure so far as possible every working man and

woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). To achieve this purpose, the Act requires employers to keep their work places free from recognized hazards likely to cause death or serious physical harm to their employees and to comply with occupational safety and health standards that the Secretary of Labor promulgates pursuant to Section 6 of the Act (29 U.S.C. 655). 29 U.S.C. 654(a). The Secretary enforces the OSH Act by issuing citations to employers that she determines, "upon inspection or investigation," have violated the Act. 29 U.S.C. 658(a). An employer may contest a citation in a formal proceeding before the Occupational Safety and Health Review Commission (29 U.S.C. 659), an independent adjudicatory body whose final orders are reviewable in the courts of appeals. 29 U.S.C. 660(a) and (b), 661.

To carry out her statutory duties, the Secretary has authority under the OSH Act to conduct inspections and investigations and to require employer recordkeeping. Section 8(a) authorizes the Secretary to enter, inspect, and investigate places of employment. See 29 U.S.C. 657(a). Unless the employer consents, such workplace inspections require a warrant based on probable cause, which may be either "specific evidence of an existing violation" or "a general administrative plan for the enforcement of the Act derived from neutral sources." *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978). Section 8(b) empowers the Secretary to subpoena both witnesses and evidence in connection with her inspections and investigations. 29 U.S.C. 657(b). The Secretary may enforce such subpoenas in a contempt proceeding in federal district court. *Ibid.* Section 8(c) directs the Secretary to prescribe regulations requiring em-

ployers to maintain and to make available to the Secretary accurate records of work-related deaths, injuries, and illnesses. 29 U.S.C. 657(c). The Secretary's regulations appear at 29 C.F.R. Pt. 1904. Finally, Section 8(f) gives employees and their representatives a right to request an inspection by filing a written complaint with the Secretary asserting a violation of an OSHA standard threatening physical harm or an imminent danger. See 29 U.S.C. 657(f). If the Secretary determines that the complainant has reasonable grounds, she must conduct "a special inspection in accordance with the provisions of this section as soon as practicable." 29 U.S.C. 657(f)(1).

2. On February 10, 1989, the Occupational Safety and Health Administration (OSHA) received a written complaint from an employee at petitioner Trinity's railroad car repair facility alleging that "[n]o hard hats and safety glasses [were] provided for non-production employees when walking through the shop work areas." Pet. App. A3. In response to that complaint, the Secretary obtained a warrant under Section 8(a) of the Act, 29 U.S.C. 657(a).[1] The warrant authorized an inspection of the plant limited to the conditions described in the complaint and to the examination and copying of records required to be maintained by 29 U.S.C. 657, 29 C.F.R. Pt. 1904,

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[1] The Secretary obtained a warrant at the outset because Trinity has a well-documented history of resisting OSHA inspections and investigations. *United States* v. *Trinity Indus., Inc.*, 876 F.2d 1485 (11th Cir. 1989); *Industrial Steel Prods. Co.* v. *OSHA*, 845 F.2d 1330 (5th Cir.), cert. denied, 488 U.S. 993 (1988); *Donovan* v. *Trinity Indus., Inc.*, 824 F.2d 634 (8th Cir. 1987); *Donovan* v. *Mosher Steel Co.*, 791 F.2d 1535 (11th Cir. 1986), cert. denied, 479 U.S. 1030 (1987); *Donovan* v. *Hackney, Inc.*, 769 F.2d 650 (10th Cir. 1985), cert. denied, 475 U.S. 1081 (1986).

and individual OSHA standards. Trinity refused to honor the warrant and hence neither a limited inspection of its workplace nor the examination of any records took place. Pet. App. A3-A4.[2]

On March 21, 1989, the Secretary served administrative subpoenas duces tecum on petitioner Trinity and on two of its subsidiaries, under Section 8(b) of the Act, 29 U.S.C. 657(b), requesting occupational injury and illness records previously sought in the warrant and supporting documentation such as payroll records showing the number of employees and hours worked and workers' compensation and sick leave records. When petitioners refused to honor the subpoenas, the Secretary petitioned to enforce them in district court, explaining that the information was needed to calculate petitioners' lost workday incidence (LWDI) rate. If that rate was above a specified level, the agency would, if appropriate, seek a new warrant to expand the scope of its inspection beyond the conditions described in the employee complaint to a general inspection of the workplace. Pet. App. A4-A6.[3]

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[2] The Secretary issued a citation to petitioner for having refused to produce the records as required by 29 C.F.R. 1904.7. An Occupational Safety and Health Review Commission administrative law judge later vacated the citation to the extent that it sought records beyond the scope of the employee complaint. Pet. App. A6 & n.6. That decision has now become final.

[3] OSHA's published field operations manual describes both the methodology for calculating an establishment's LWDI rate and the use of that rate in determining when to conduct a comprehensive safety inspection of the worksite. The data needed to compute the LWDI rate include the number of employee hours worked at the site and the number of injuries involving days away from work or days of restricted work activity. When OSHA receives a formal employee complaint,

The district court held that the Secretary was entitled to subpoena only records related to the employee complaint. Applying the three-part test for administrative subpoenas set out in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950), the court held that the inquiry was within the authority of the agency and the demand for production was not too indefinite. The court concluded, however, that the information sought was not "reasonably relevant to the authorized inquiry," as *Morton Salt* also requires, because—in the court's view—the "authorized inquiry" is limited to the investigation of the employee complaint. Pet. App. A6, A10-A11.

3. The Secretary appealed, and the court of appeals reversed. Pet. App. A1-A16. Applying the same *Morton Salt* standard, the court of appeals rejected the district court's narrow construction of "the authorized inquiry." *Id.* at A10-A16. It observed that OSHA was actually undertaking two separate inquiries: "The first was an inspection of the workplace, limited to the conditions described in the employee complaint. The second was a general review of the employer's health and safety records to see whether its LWDI called for a broader inspection of the workplace." *Id.* at A11. In this case, "[t]he records that the Secretary subpoenaed were reason-

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its inspection plan generally requires expanding the scope of the resulting workplace inspection to the entire establishment if the establishment's LWDI rate is at or above the Bureau of Labor Statistics' lowest average national LWDI rate for manufacturing over the past five years. C.A. App. 40, 49-52. However, a full-scope safety inspection will not usually be conducted following a complaint, even in an establishment with a high LWDI rate, if such an inspection has already been conducted in the current or two previous fiscal years.

ably relevant to the second inquiry but not to the first." *Id.* at A11-A12.

Relying on this Court's administrative subpoena decisions, the court of appeals held that the information sought by the subpoena need be relevant only to "*some* (any) inquiry that the Secretary is authorized to undertake"; it need not be relevant to the particular complaint that triggered the broader inquiry. Pet. App. A12 (citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943)). After observing that even in the absence of an employee complaint, OSHA had an undisputed right to subpoena petitioners' documents to calculate their safety records, the court concluded that there was no reason to preclude such a subpoena following an employee complaint. Pet. App. A14. As the court explained, "[a]n employee complaint is just the sort of thing that would reasonably cause OSHA to 'take steps to inform itself as to whether there is probable violation of the law' beyond the conditions cited in the complaint." *Ibid.* (quoting *Morton Salt*, 338 U.S. at 643).

Finally, the court of appeals rejected petitioners' argument that the Secretary may not subpoena documents needed to calculate their LWDI rate because that action would expand the scope of a complaint inspection to a "wall to wall" inspection of the entire plant. Pet. App. A14. As the court explained, a subpoena for required records is "hardly equivalent" to a comprehensive plant inspection. *Ibid.* Nor does the subpoena itself trigger such an inspection. "It is the employer's own safety record that would do that." *Ibid.* Moreover, if petitioners objected to the inspection, the Secretary would still be required to obtain a warrant before inspecting the entire plant. *Ibid.* In sum, the court held that the Secretary "is

authorized to review the occupational health and safety records that employers are required to keep by the Act for her use, and the fact that she chooses to do so following an employee complaint does not diminish her power to subpoena the records that she requires." Pet. App. A15-A16.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.[4]

1. There is no question that Section 8(b) of the OSH Act, 29 U.S.C. 657(b), authorizes the Secretary to subpoena documents in connection with her inspections and investigations. As the courts below understood, "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably

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[4] In response to an order of the district court on remand from the Third Circuit, petitioners have now supplied some, but not all, of the records sought by the Secretary's subpoenas. While the information supplied did not allow the Secretary to verify petitioners' figures, it was sufficient to compute petitioners' LWDI rate, and the Secretary does not intend to take further steps to enforce the subpoena. Accordingly, the present dispute may well be moot. See *United States* v. *Sweet*, 655 F.2d 54, 55-56 (5th Cir. 1981) (compliance with administrative subpoena renders case moot); *EEOC* v. *St. Regis Paper Co.*, 717 F.2d 1302, 1303-1304 (9th Cir. 1983) (same); but see *SEC* v. *McGoff*, 647 F.2d 185, 190 n.4 (D.C. Cir.) (compliance does not moot appeal because "the subpoenaed party may pursue a claim for relief, including return of the documents"), cert. denied, 452 U.S. 963 (1981); *FTC* v. *Browning*, 435 F.2d 96, 97-98 n.1 (D.C. Cir. 1970) (same). As we explain, *infra*, review should not be granted in any event.

relevant." *Morton Salt Co.*, 338 U.S. at 652; accord *Donovan* v. *Lone Steer, Inc.*, 464 U.S. 408 (1984) (approving administrative subpoena under Fair Labor Standards Act); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946) (same). Unlike a warrant to conduct an actual search, an administrative subpoena does not require a showing of probable cause. *United States* v. *Powell*, 379 U.S. 48, 57 (1964); *Lone Steer*, 464 U.S. at 414-415. An agency with subpoena authority "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Morton Salt*, 338 U.S. at 642-643.

Petitioners do not challenge the applicability of the *Morton Salt* standard to administrative subpoenas under the OSH Act. Similarly, petitioners do not identify any conflict in the circuits over the use of administrative subpoenas under the OSH Act. The courts of appeals have consistently held that the Secretary may use subpoenas to obtain documents under the OSH Act, including the kinds of records at issue in this case. *McLaughlin* v. *Kings Island*, 849 F.2d 990 (6th Cir. 1988); *Brock* v. *Emerson Elec. Co.*, 834 F.2d 994 (11th Cir. 1987); *Donovan* v. *Union Packing Co.*, 714 F.2d 838 (8th Cir. 1983); *In re Kulp Foundry, Inc.*, 691 F.2d 1125, 1132 (3d Cir. 1982); cf. *McLaughlin* v. *A.B. Chance Co.*, 842 F.2d 724 (4th Cir. 1988) (Secretary need not obtain either a warrant or a subpoena for access to records an employer is required by law to maintain). The court below properly reached the same conclusion, upholding the Secretary's authority to subpoena documents necessary to evaluate petitioners' overall safety record and—depending on the result—the need to conduct further inspections of the workplace.

Petitioners contend, however, that those particular subpoenas should be treated differently because they were issued following the Secretary's receipt of an employee complaint. In petitioners' view (Pet. 9-11), the Secretary should not be allowed to use an administrative subpoena under Section 8(b) of the Act (even for required records under Section 8(c)) to obtain evidence that could serve to expand the scope of a complaint inspection. See Pet. 9-10. They contend that issuance of a subpoena under these circumstances would be "an 'end run' around the limitations of § 8(f) of the Act, the Fourth Amendment, and the Court's holding in *Barlow's*" requiring probable cause based on a neutral administrative plan to justify a comprehensive plant inspection. *Id.* at 10-11.

In essence, petitioners argue that warrant standards should apply to a subpoena whenever the information sought by the subpoena might lead to a future warrant application. However, petitioners cite no authority for this novel proposition. This Court rejected similar reasoning in *Lone Steer*, where it held that the standards for issuing subpoenas in *Oklahoma Press* and *Morton Salt*, rather than the warrant requirement set forth in *Barlow's*, govern the Secretary's subpoena of an employer's payroll records under the Fair Labor Standards Act. 464 U.S. at 414-415. Petitioners attempt (Pet. 12) to distinguish *Lone Steer* on the basis that the subpoena there did not require "entry." The subpoena in this case, however, similarly does not require on-site inspection. And in *Lone Steer*, no less than here, the records review could have led to a later inspection of the premises. See 464 U.S. at 415-416. Cf. *Union Packing Co.*, 714 F.2d at 841-842 (*Barlow's* does not apply to use of subpoena to obtain records

in "programmed" inspection to determine whether to conduct comprehensive physical search of establishment).

Petitioners' statutory arguments are also unpersuasive. Nothing in the language of Section 8 of the OSH Act suggests that the Secretary's subpoena power under Section 8(b) is limited in any way by Section 8(f), which concerns employee complaints. Rather, Section 8(b) broadly authorizes the Secretary to utilize subpoenas "[i]n making his inspections and investigations under this chapter." 29 U.S.C. 657(b). Section 8(f) addresses a different subject: it gives employees a right to request an OSHA inspection and imposes on the Secretary a duty to investigate reasonable employee complaints. See 29 U.S.C. 657(f). Thus, as the court of appeals observed, the case law discussed by petitioners (Pet. 8-9) regarding the proper scope of a complaint inspection or a warrant under Section 8(f) simply has no bearing on the Secretary's subpoena power under Section 8(b). That power is governed solely by the *Morton Salt* standard. See Pet. App. A14-A15.

2. Petitioners characterize the question in this case as whether the Secretary "may expand limited scope complaint inspections under [Section 8(f) of the Act] into comprehensive plant-wide inspections under [Section 8(a)] without first demonstrating that the establishment was selected for inspection based on a reasonable administrative inspection plan, as required by [*Barlow's*]." Pet. i. That characterization is inaccurate. The Secretary has neither attempted to conduct a plant-wide inspection of petitioners' premises nor applied for a warrant to do so; certainly the court below did not authorize such an inspection nor issue such a warrant. Cf. *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163 (1967) (case

is not ripe when "[a]t this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order"). Instead, the Secretary sought only to subpoena the occupational injury and illness records needed to determine *whether* to seek a warrant for a broader inspection of petitioners' premises.

The present subpoena was thus the second step of OSHA's investigatory procedure in this case. The first step was the warrant to conduct a limited-scope complaint inspection; the second step was the request for records to determine the employer's overall safety record;[5] and the third step—which remains hypothetical—is a possible full-scope or "wall-to-wall" inspection.[6] An employer is protected at steps one and three by the *Barlow's* warrant requirement, and is protected at step two by the *Morton Salt* subpoena requirement. Petitioners are not entitled, however, to the protections of step three when that step has not and may never be reached. As the appeals court stated, ordering an employer to produce required records for the Secretary's inspection "is hardly equivalent to undertaking a comprehensive plant inspection: requiring the production of the documents does not even, by itself, trigger such an inspection. It is the employer's own safety record that would do that" (Pet. App. A14)—but only after the Secretary

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[5] As the court of appeals noted (Pet. App. A8), this case does not involve the proper scope of inspection of records pursuant to the warrant issued at the first step. The request here was made in separate administrative subpoenas.

[6] Alternatively, the Secretary might seek an intermediate-scope inspection if steps one and two reveal, for example, specific evidence of potential OSHA violations in a particular area of the plant, or a pattern of similar employee injuries.

has reviewed the records and determined, based on criteria established in her neutral administrative plan, to undertake a broader inspection. *Ibid.* Even then, "[i]f [petitioners] did not consent to a broader inspection of the workplace, the Secretary would have to obtain a warrant." *Ibid.*

Moreover, in cases where this third step was reached, the courts of appeals have approved OSHA's use of LWDI rates to expand a complaint inspection to a comprehensive or "wall-to-wall" safety inspection in a high-hazard industry. *In re Cerro Copper Products Co.*, 752 F.2d 280 (7th Cir. 1985); *In re Carondelet Coke Corp.*, 741 F.2d 172 (8th Cir. 1984). In each of those cases, the court quite reasonably held that an employer's LWDI rate was a relevant factor in deciding whether to grant a warrant for a full-scope inspection under *Barlow's*. As one court has explained, "[w]ithout preliminary information such as a company's lost workday injury and illness rate, it would be difficult for the Secretary to develop a plan with neutral criteria which could be used to select a workplace for inspection." *Union Packing Co.*, 714 F.2d at 841. Thus, even if petitioners' "question presented" were ripe for review, there is no conflict in the circuits and no other reason for this Court to review an issue that the lower courts have correctly addressed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282061 20184